

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1091

Cir. Ct. No. 2009JV62B

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF TIMOTHY J. K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TIMOTHY J. K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Washington County:
DAVID C. RESHESKE and ANDREW T. GONRING, Judges. *Affirmed.*

¶1 REILLY, J.¹ Timothy J.K. appeals from a circuit court order requiring him to register as a sex offender, and from an order denying his postdisposition motion for a new hearing. Timothy argues that he is entitled to a new sex offender registration hearing as the circuit court's order requiring him to register as a sex offender was based on the court's misinterpretation of a psychologist's report. We hold that the court did not misinterpret the report, and affirm the court's discretionary decision to deny Timothy a new hearing.

BACKGROUND

¶2 The circuit court found Timothy was delinquent after he admitted to sexually assaulting his younger brother in violation of WIS. STAT. § 948.02(2). At the time of the assault, Timothy was fifteen and his brother was fourteen. The circuit court ordered Timothy to be placed in an adolescent center to undergo sex offender treatment. In its order, the court also stated that it would make a final decision on whether Timothy would have to register as a sex offender after Timothy completed his treatment.

¶3 A therapist at the adolescent center performed a psychosexual evaluation of Timothy and recommended sex offender registration. At a subsequent hearing, the court ordered another psychosexual examination, this one to be conducted by psychologist Charles Lodl, Ph.D. *See* WIS. STAT. § 301.45(1m)(d)(1). Lodl's original report stated that Timothy presented a "low" probability of reoffending and that Timothy "should be reevaluated after a period of at most two years or following significant social, environmental, familial,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

sexual, affective, physical or psychological change.” Lodi, however, failed to make a recommendation on whether Timothy should register as a sex offender, and stated that “[t]here are presently no empirically validated actuarial instruments that can be used to accurately estimate the risk of adolescent sexual reoffending.” When the State notified the circuit court that Lodi did not make a recommendation, the court requested a recommendation from Lodi. Lodi wrote back stating that he “would recommend that Timothy not be required to register as a sex offender.”

¶4 At the sex offender registration hearing, the State did not take a position on recommending Timothy for registration, as the report of the therapist conflicted with Lodi’s recommendation. The Washington County Human Services Department recommended against registration. After reviewing the therapist’s report and Lodi’s report, the circuit court ordered Timothy to register as a sex offender. The court stated that it was “not comfortable enough with the opinion of [Lodi] here, and I don’t believe that it is a strong enough opinion to justify the opinion that [Lodi] renders here.” Regarding Lodi’s recommendation that Timothy be reevaluated in at most two years, the circuit court stated “[t]hat isn’t, to me, an opinion that says registry isn’t necessary; that, to me, is an opinion saying it may not be necessary depending upon what Timothy does in the future.”

¶5 Timothy filed a postdisposition motion for a new hearing, arguing that the circuit court’s decision to require registration was an error of fact because the court misinterpreted Lodi’s report. Specifically, Timothy argued that Lodi’s recommendation that Timothy be reevaluated in at most two years did not qualify Lodi’s opinion that sex offender registration was not necessary. Timothy stated that Lodi was prepared to testify that Timothy did not need to register as a sex offender. The circuit court denied Timothy’s motion, ruling that a circuit court is

never bound by the recommendation in a report, and that a court must base its decision on what is in the best interests of the public.² Timothy appeals.

STANDARD OF REVIEW

¶6 Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; WIS. STAT. § 809.30(2)(h). First, we must determine if the motion alleged facts that—if true—would entitle the defendant to the requested relief. *Allen*, 274 Wis. 2d 568, ¶9. This is a question of law that we review de novo. *Id.* If the motion raises such facts, the circuit court must hold a hearing. *Id.*

¶7 If, however, the defendant's motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Id.* We review a circuit court's discretionary decision under the erroneous exercise of discretion standard. See *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). Thus, we will uphold a discretionary decision of the circuit court if it reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. *Id.* In reviewing a discretionary decision, we will look for reasons to sustain the circuit court. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

² Judge David C. Resheske was the presiding judge at the sex offender registration hearing, while Judge Andrew T. Gonring presided over the postdisposition hearing.

DISCUSSION

¶8 Timothy relies on *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, to support his argument that he is entitled to a new sex offender registration hearing. In that case, Tiepelman was convicted of theft and placed on probation. *Id.*, ¶5. When his probation was revoked, he returned to the circuit court for sentencing. *Id.* In reaching its sentencing decision, the circuit court mistakenly stated that Tiepelman had been convicted over twenty times. *Id.*, ¶6. In fact, Tiepelman was *charged* with twenty offenses, but convicted only five times. *Id.* Tiepelman subsequently filed a postconviction motion, arguing that the circuit court violated his right to due process by relying on inaccurate information about his criminal record. *Id.*, ¶7. In reversing Tiepelman’s sentence, the supreme court set out a test that a defendant must meet when bringing a motion for resentencing based on a circuit court’s alleged reliance on inaccurate information: (1) the defendant must establish that the information relied on by the circuit court was inaccurate and (2) the defendant must show that the circuit court actually relied on the inaccurate information. *Id.*, ¶31.

¶9 Timothy fails to clear the first hurdle of the *Tiepelman* standard. The circuit court’s decision to require Timothy to register as a sex offender was not based on any mistaken information. Lodl clearly stated “I would recommend that Timothy not be required to register as a sex offender.” The circuit court did not misread Lodl’s recommendation; rather, it concluded that Lodl’s recommendation was not strong enough. Indeed, Lodl’s original assessment did not include a recommendation as to whether Timothy should have to register as a sex offender. Lodl originally wrote that “[t]here are presently no empirically validated actuarial instruments that can be used to accurately estimate the risk of adolescent sexual reoffending.” It was only after the State wrote a letter to the

court requesting Lodl's opinion that Lodl came out against registration. Furthermore, Lodl characterized Timothy's estimated risk of reoffending as "low," not nonexistent. Lodl also wrote that Timothy should be reevaluated again in at most two years to determine if his risk of reoffending had changed. Finally, the circuit court noted the therapist's recommendation that Timothy register as a sex offender, indicating that the court did not rely exclusively on Lodl's report in reaching its conclusion.

¶10 As Timothy has not alleged any facts to demonstrate that he is entitled to a new hearing, and as the circuit court's discretionary decision to deny a new hearing was not clearly erroneous, we affirm.

CONCLUSION

¶11 Timothy's request for a new sex offender registration hearing is denied.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

